UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of THE WALT DISNEY COMPANY, Petitioner, -against- NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATION WORKERS OF AMERICA, LOCAL 16, AFL-CIO, CLC, Respondent.	:	Civil Action No. 10 Civ. 5982 (SHS)

MEMORANDUM OF LAW IN SUPPORT OF THE WALT DISNEY COMPANY'S MOTION TO REMAND, IN FURTHER SUPPORT OF ITS MOTION TO QUASH AND/OR FOR A PROTECTIVE ORDER AND IN OPPOSITION TO RESPONDENT'S CROSS-MOTION TO COMPEL

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Preliminary Statement

Petitioner The Walt Disney Company ("TWDC") respectfully submits this Memorandum of Law in support of its motion, pursuant to 28 U.S.C. § 1447(c), for an order remanding this matter to the New York State Supreme Court, or, alternatively, in further support of its motion for an order quashing a non-judicial subpoena duces tecum, dated July 20, 2010 (the "Subpoena"), and/or, pursuant to CPLR § 3103, for a protective order.[1] Petitioner TWDC and improperly joined "cross-respondent" ABC Inc. also respectfully submit this memorandum of law in opposition to the cross-motion of Respondent National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of The Communication Workers of America, Local 16, AFL-CIO, CLC ("NABET-CWA, Local, 16") to compel compliance with the Subpoena.

Respondent has improperly removed this state court special proceeding based on Section 301 of the Labor Management Relations Act ("LMRA"), which provides federal subject matter jurisdiction only over "suits for violations of contracts between an employer and a labor organization…." The matter here in dispute, however, does not involve a claimed violation of a collective bargaining agreement but a dispute as to whether a document created and owned by a non-signatory to a collective bargaining agreement and non-party to an arbitration arising from that agreement is protected from disclosure by the attorney-client privilege. Because the dispute before the court does not require the interpretation of a collective bargaining agreement, jurisdiction under § 301 of LMRA does not attach.

Respondent asks this Court to compel TWDC to turn over its privileged attorney client communication to a fact-finding labor contract arbitrator even though TWDC is not a party to the agreement giving rise to the arbitration; has not consented to the labor arbitrator determining its substantive privilege rights and has not consented to be bound by the arbitration.

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[1] A complete set of TWDC's state court motion papers are annexed as Exhibit A to the accompanying Declaration of Rachel Schwartz, dated August 17, 2010 (the "Schwartz Dec."). TWDC's Memorandum of Law In Support of Motion to Quash and/or for a Protective Order is referred to herein as "TWDC Moving Mem." Unless otherwise stated, defined terms herein have the same meaning as in TWDC's moving papers.

Respondent also asks this Court to compel ABC Inc. to comply with the Subpoena. However, ABC Inc. is not a party to this action and is not subject to the Court's jurisdiction. TWDC, the only real party in interest, has objected to ABC Inc.'s production of TWDC's privileged document.

TWDC's motion to remand should be granted, or, alternatively, its motion to quash the Subpoena and/or for a protective order granted in its entirety and respondent's cross-motion to compel should be denied because:

1. Removal of this state court action was improper under 28 U.S.C. § 1441, and remand is mandated, because there is no federal subject matter jurisdiction under § 301 of LMRA, over an action to quash or enforce an arbitral subpoena against a non-party to a collective bargaining agreement, particularly where, as here, there is a challenge to the subpoena on attorney client privilege grounds.

2. There is no authority under § 301 of LMRA or the body of federal common law interpreting it that a non-signatory to a collective bargaining agreement should be required to submit its substantive attorney client privilege claim to an arbitrator for determination in an arbitration to which it is not a party and has not consented to be bound, particularly where, as here, the arbitrator has already held that TWDC has no standing in the arbitration to assert its attorney client privilege defense to the Subpoena.

3. Respondent has failed meet its high burden of proof to invade TWDC's attorney-client privilege. Contrary to respondent's argument, the record on this motion confirms that the subpoenaed document is immune from disclosure under *United States v. Upjohn* and its progeny. The document is a communication between a corporate client and its in house corporate counsel providing facts and results of an internal investigation for the sole purpose of obtaining legal advice. As the Supreme Court made clear in *Upjohn,* respondent's entitlement to learn the underlying facts is not grounds for access to a privileged communication. The underlying facts are and have been available to respondent, and respondent has no right as a matter of law to eavesdrop on TWDC's privileged attorney client "conversation."

4. As set forth in TWDC's moving papers, California state law applies to the claims and defenses asserted in its state court Petition and motion to quash by non-party TWDC, which is based in California and where the privileged communication took place. In any event, California law categorically bars an *in camera* inspection of TWDC's privileged document regardless of which law applies. TWDC entitled to a judicial determination of whether the subpoenaed document is a privileged communication immune from disclosure.

5. The claim that a privilege has been waived is not a federal question over which this court has jurisdiction. That respondent has sought to inject its waiver argument into this proceeding only serves to establish that this matter should be remanded to the state court. In any event, contrary to respondent's presentation of the record, TWDC's attorney client privilege was not waived during Ms. Yang's testimony at the arbitration hearing. First, the document ABC Inc. introduced into evidence as Employer Exhibit 8 was not compiled or extracted from the privileged memorandum respondent has subpoenaed. Employer Exhibit 8 was extracted from a forensic report that was produced to respondent and which respondent introduced as an exhibit at the hearing as Union Exhibit 3. Second, TWDC's privilege was not waived because Ms. Yang neither reviewed the Memorandum in preparation for her testimony or to refresh her recollection.

ARGUMENT

POINT I

PETITIONER'S MOTION TO REMAND SHOULD BE GRANTED

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonnen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The party seeking a federal forum bears the burden of establishing that federal jurisdiction exists. *See, e.g., Buhoiu v. Micromagazin*, 1987 WL 25890, at *1, (E.D.N.Y. NOV. 17, 1987). Respondent has failed to meet that burden.

Absent diversity, only actions over which the federal courts have original jurisdiction may be removed from state to federal court. 28 U.S.C. § 1441(b). The Removal

Statute is to be strictly construed against removal jurisdiction and any doubt as to jurisdiction should be resolved in favor of remand. *See, e.g. Couloute v. Hunt, Leibert, Chester & Jacobson LLC and Mercury Mortgage LLC* , 295 B.R. 689 (D. Ct. 2003); *Salverson v. Western States Bankcard Association,* 525 F.Supp. 566, 567 (N.D. Ca. 1981). It is axiomatic that a motion for remand must be granted where, as here, there is no federal subject matter jurisdiction over the removed action. *See, e.g. Sarnell v. Tickle,* 566 F. Supp. 557 (E.D.N.Y. 1983); *Couloute v. Hunt, Leibert, Chester & Jacobson , LLC and Mercury Mortgage, Inc.,* 265 B.R. 689 (D. Ct. 2003).

A. There Is No Federal Subject Matter Jurisdiction Under § 301 of LMRA Over A Non-Signatory's Privilege Determination Here.

Section 301 of LMRA, upon which respondent relies, grants federal subject matter jurisdiction over claims that there has been a violation of a collective bargaining agreement, including claims that an employer or a union violated such an agreement by not submitting a claim to arbitration that it agreed to so submit. *See, e.g., Textron Lycoming Reciprocating Engine Div., Auco Corp. v. UAW,* 523 U.S. 653, 118 S. Ct. 1626 (1998)("Because the union's complaint alleges no violation of the collective-bargaining agreement, neither we nor the federal courts below have subject matter jurisdiction over this case under Sec. 301 …") This case, however, involves a claim by an entity not bound by the collective bargaining agreement that its document is protected from disclosure by the attorney-client privilege. Respondent does not cite one provision of the ABC-NABET collective bargaining agreement, let alone claim that a non-party's desire for a judicial determination of its privilege claim violates some provision of that agreement.

TWDC is not a party and has not consented to have its substantive privilege rights determined by the ABC-NABET labor contract arbitrator. The arbitrator agrees and has already ruled that TWDC has no standing to assert its substantial privilege right in the arbitration. The basis of TWDC's requested relief is that the subpoenaed document constitutes a privileged attorney client communication between a member of TWDC's MA department and TWDC's in house corporate counsel. TWDC is a non-signatory to the collective bargaining agreement and a non-party to the private arbitration proceeding between respondent and ABC Inc. There is no basis for compelling TWDC to submit its substantive privilege defenses to the Subpoena to the arbitrator.

As a non-party, TWDC is entitled as a matter of law to a judicial determination of its privilege claim, particularly since applicable California law provides TWDC with important safeguards that bar *in camera* inspections on challenged claims of attorney client privilege. *See, e.g., Minerals and Chemicals Philipp Corp., et al. v. Minerals and Chemicals Philipp Corp.,* 15 A.D.2d 432, 224 N.Y.S.2d 763 (1st Dept. 1962); *Reuters Limited v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 662 N.Y.S.2d 450 (1st Dept. 1997)(non-party to arbitration proceeding entitled to judicial determination of whether documents called for by non-judicial arbitration subpoena are highly confidential and not subject to disclosure); California Rule of Evidence § 915. [2]

The arbitrator has already ruled that TWDC has no standing in the arbitration to assert its attorney client privilege defense to the Subpoena. *See* July 27, 2010 Order of Arbitrator Weinstock, a copy of which is annexed as Exhibit B to the Schwartz Dec. Respondent does not dispute that TWDC is the real party in interest and the proper party to challenge the Subpoena since the Memorandum is a TWDC document over which TWDC is asserting its attorney client privilege. *See* TWDC Moving Mem at p. 6-7, Exhibit A to the Schwartz Dec. Because the arbitrator herself has indicated that TWDC is not properly before her, this privilege dispute should notbe decided by that same arbitrator.

The issue of subject matter jurisdiction relates only to whether only a federal court, – as opposed to the state court where TWDC properly commenced its special proceeding – may properly adjudicate an attorney-client privilege claim by a non-party to a collective bargaining agreement, an issue not encompassed within § 301 of LMRA's grant of jurisdiction over violations of such agreements. *Cf, Misson Theatrical Inc. v. Federal Express*, 89 F.3d 1244, 1252 (6th Cir. 1996)(recognizing that federal courts are courts of limited jurisdiction and that powers not given to federal courts by Congress are left to the state courts). Contrary to respondent's argument, § 301 of LMRA does not imbue the federal courts with subject matter jurisdiction to enforce an arbitral subpoena that effectively binds a non-signatory to a collective bargaining agreement by requiring it to submit to the "procedures" of an arbitration to which it did not agree for a determination of the significant substantive issue of the validity of an attorney client privilege claim. To be clear, the issue before this Court is not whether TWDC as a non-party can be compelled to produce documents in the pending arbitration. Nor is the issue whether the arbitrator has authority to issue a subpoena *duces tecum* to non-party TWDC. The question of this court's subject matter jurisdiction does not involve the merits of whether TWDC must in fact produce any documents in the arbitration at all, only who has the jurisdiction to decide the issue.

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[2] Respondent erroneously argues that the holdings in *Minerals and Chemicals Philipp Corp., et al. v. Minerals and Chemicals Philipp Corp.,* and *Reuters Limited v. Dow Jones Telerate, Inc.*, are inapplicable because TWDC "participated" in the arbitration when Grace Yang, an employee in TWDC's MA department testified at the hearing. It is beyond cavil that a corporation does not "participate" in an arbitration so as to be bound by the arbitration or its procedures simply because one of its representatives is made available as a fact witness. *See, e.g., Dalow Industries, Inc. v. Jordache Enterprises, Inc.*, 631 F. Supp. 779 (S.D.N.Y. 1986); *SCAC Transport (USA) Inc. v. S.S. Danaos,* 578 F. Supp. 327 (S.D.N.Y. 1984). Any contrary holding would turn the law on its head and eviscerate the requirement that a party's consent to participate in and by bound by an arbitration must be clear and unequivocal. *Id.*

Although respondent asserts that this Court has jurisdiction to decide this matter under § 301 of LMRA, in fact this is a question of first impression in this district and this circuit. Neither the Second Circuit nor any of the district courts in this circuit have expressly addressed, much less decided, the question of whether subject matter jurisdiction exists under § 301 of LMRA to enforce an arbitration subpoena against a non-signatory to the collective bargaining agreement, particularly where the non-party has asserted an attorney client privilege objection to that subpoena. Moreover, this is far from settled law outside the Second Circuit. Only a few courts have enforced party subpoenas arising from an arbitration conducted pursuant a collective bargaining agreement, and only a handful more have enforced such subpoenas against non-parties. However, not one federal court has found subject matter jurisdiction under § 301 of LMRA to enforce an arbitral subpoena against a non-party over an objection on attorney client privilege. With respect to those courts that have enforced arbitral subpoenas against a non-signatory under § 301 of LMRA, each has assumed its enforcement authority under the Federal Arbitration Act (the

"FAA").[3] The Seventh Circuit (the only circuit other than the Sixth Circuit to have considered this issue), however, expressly rejected subject matter jurisdiction under § 301 of LMRA to enforce an arbitral subpoena against a non-signatory to a collective bargaining agreement, which is respondent's asserted basis for this court's subject matter jurisdiction.

As respondent conceded during the August 16, 2010 oral argument, in the Second Circuit the FAA does not apply to collective bargaining agreements, and thus provides no jurisdictional or other basis for enforcing the Subpoena under § 301 of LMRA. In this regard, we again note that, with one exception, federal subject matter jurisdiction under § 301 of LMRA to enforce an arbitral subpoena against a non-signatory has been expressly predicated on enforcement authority derived from the FAA. Absent such FAA enforcement authority which does exist in this circuit, there is no independent subject matter jurisdiction under § 301 of the LRMA to enforce arbitral subpoenas against non-signatories to a collective bargaining agreement.

It is well-established that the scope of federal jurisdiction under section § 301 of LMRA is extremely narrow, and is limited to "suits for violations of contracts." *Textron Lycoming Reciprocating Engine Div., Avco v. UAW,* 523 U.S. 653, 657-58 118 St. Ct. 1626 (1998). As the Supreme Court held in *Textron*, "a suit for violation of a contract…is one filed *because a contract has been violated….*[this provision] erects a gateway through which parties may pass into federal court." Thus, under *Textron,* only cases alleging a violation of a collective bargaining agreement fall under the jurisdictional grant of § 301 of LMRA. It is axiomatic that since only parties to a contract can violate it, there can be no sustainable allegation that a non-party violated a collective bargaining agreement.

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[3] *Wilkes-Barre Publishing Co. v. Newspaper Guild*, 559 F. Supp. 875, 882 (M.D. Pa. 1982)(enforcing party subpoena); *Local Lodge 1746, International Association of Machinists v. Pratt & Whitney,* 329 F. Supp. 283, 284 (D. Conn. 1971)(enforcing party subpoena); *Laufman v. Anpol Contracting,* 1995 WL 360015, at *1 (S.D.N.Y. Jun 13, 1995); *Meadows Indem. Co. Nutmegs Co.,*157 F.R.D. 42, 44 (M.D. Tenn. 1994); *Stanton Paine Webber Jackson & Curtis,* 685 F. Supp. 1241 (S.D.Fla. 1988); *American Federation of Television and Radio Artists v. WBJK-TV (New World Communications of Detroit,* 164 F.3d 1004 (6th Cir. 1999); and *Teamsters National Automotive Transporters Industry Negotiating Committee v. Troha,* 328 F.3d 325 (7th Cir. 2003).

Respondent relies on two of these cases: *American Federation of Television and Radio Artists v. WBJK-TV (New World Communications of Detroit,*164 F.3d 1004 (6th Cir. 1999) and *In the Matter of Arbitration Between Laufman and Allied Workers Union, Local 89-22 v. Anpol Contracting*, 1995 WL 360015 (S.D.N.Y. June 13, 1995), neither of which are binding on this court. In addition, *WBJK* was decided over a vigorous and well reasoned dissent, and *Anpol* is entirely distinguishable. Subject matter jurisdiction was never challenged in *Anpol;* the Court assumed its enforcement power under the FAA, which the Second Circuit subsequently held is inapplicable here, and the subpoena was not challenged on the basis of the attorney client privilege challenge, which is a critical difference. *See, Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812,* 842 F.3d 52 (2d Cir. 2001)(expressly holding that the FAA does not apply to collective bargaining agreements).

Following *Textron*, numerous courts, including the Seventh Circuit, have held that § 301 of LMRA does not provide a basis for federal jurisdiction over a claim against a non-signatory to a collective bargaining agreement. *See, e.g., International Union, United Mine Workers v. Covenant Coal Corp.*, 922 F.2d 895, 897 (4th Cir. 1992); *Ramsey v. Signal Delivery Serv. Inc.* , 631 F.2d 1210, 1212 (5th Cir. 1980); *Fabian v. Freight Drivers & Helpers Local 557*, 448 F. Supp. 835, 838 (D. Md. 1978) ("It is axiomatic, however, that a § 301 suit may be brought only against those who are parties to the contract in issue.") *Teamsters National Automotive Transporters Industry Negotiating Committee v. Troha*, 328 F.3d 325 (7th Cir 2003).

Here, non-party TWDC commenced a special proceeding against respondent seeking an order quashing the Subpoena on attorney client privilege grounds. As the privilege holder, TWDC is the real party in interest in this action, and this Court's determination concerning its subject matter must be based on TWDC's relationship to the collective bargaining agreement not ABC Inc.'s. *See, e.g.*, Fed. R. Civ. Proc. 17; *Kingsway Financial Services Inc. v. PricewaterhouseCoopers LLP*, 2008 WL 4452134 (S.D.N.Y. 2008). Thus, TWDC's status as a non-party is highly relevant and certainly not a "red herring" because TWDC's non-party status is determinative of whether this federal court, rather than the state court, has subject matter jurisdiction under § 301 of LMRA to enforce the Subpoena.

Respondent may not avoid a determination that there is no subject matter jurisdiction under § 301 of LMRA over a non-signatory to the collective bargaining agreement by its unsupported and conclusory assertions that TWDC and ABC Inc. should be considered "one company" for purposes of the arbitration. ABC Inc. and TWDC are separate and distinct, albeit related, corporate entities, that observe separate corporate formalities, with separate officers and directors. As set forth in the accompanying Declaration of ABC Inc. Senior Counsel, Mary Mooney, dated August 17, 2010 ("Mooney Dec.") although she interposed a privilege objection on

TWDC's behalf in her capacity as ABC Inc.'s attorney, she never appeared as counsel for TWDC in the arbitration, and did not accept service of the Subpoena on TWDC's behalf. In addition, and contrary to respondent's argument, as set forth above, the separate corporate forms of TWDC and its indirect subsidiary ABC Inc. cannot be ignored simply because one of the fact witnesses at the arbitration worked in TWDC's MA department. *See, e.g., Dalow Industries, Inc. v. Jordache Enterprises, Inc.*, 631 F. Supp. 799 (S.D.N.Y. 1986). Finally, TWDC did not manifest its intent to participate in or be bound by the arbitration simply because it participated in the investigation concerning the Studio's complaint. As Ms. Yang testified, the Memorandum did not result in Mr. Pinkava's termination or any of the disciplinary action the American Broadcasting Companies, Inc. imposed on any other employees that Ms. Yang interviewed in connection with the investigation. *See* Exhibit 5 to the Mooney Dec., July 13 Tr. at 219:12-13 and 229:6-11.

TWDC indisputably is not a signatory to the collective bargaining agreement between respondent and ABC Inc. and that agreement does not reference any rights or duties of TWDC. Since TWDC has no rights or obligations under the agreement, respondent has not and cannot claim that TWDC violated that agreement by not producing its privileged document in an arbitration conducted pursuant to that agreement. Since TWDC is incapable of violating the collective bargaining agreement, it cannot be subject to suit in federal court under § 301 of LMRA. And since TWDC is not subject to suit under § 301 of LMRA, respondent cannot assert subject matter jurisdiction under that statute over non-party TWDC to enforce a subpoena for one of TWDC's privileged documents. *See, e.g., International Union, United Mine Workers v. Covenant Coal Corp.*, 922 F.2d 895, 897 (4th Cir. 1992); *Ramsey v. Signal Delivery Serv. Inc.* , 631 F.2d 1210, 1212 (5th Cir. 1980); *Fabian v. Freight Drivers & Helpers Local 557*, 448 F. Supp. 835, 838 (D. Md. 1978).

Subject matter jurisdiction under § 301 of LMRA is particularly inappropriate in this case because the determination of TWDC's privilege claim does not require the court to construe the terms of the collective bargaining agreement. Indeed, as noted, TWDC is unaware of a single federal court that has exercised subject matter jurisdiction pursuant to § 301 of LMRA over a privilege claim asserted by a non-signatory to a collective bargaining agreement in response to a subpoena issued in an arbitration to which it has not consented to be bound.

Moreover, this Court should reject any suggestion that the enforcement of a subpoena issued from a labor arbitrator against a non-party should be controlled by federal, not state law, because federal courts enjoy exclusive jurisdiction over LMRA § 301 actions to help establish a uniform body of federal labor law. As the Supreme Court stated in *Teamsters v. Lucas Flour,* 369 U.S. 95, 82 S. Ct. 571 (1962), federal jurisdiction under § 301 of LMRA "preempts local law so that a uniform body of federal law can be developed *to avoid conflicts in the interpretation of collective bargaining agreements.*" (Emphasis added). However, "the need to create a uniform body of federal law under § 301 of LMRA does not require federal adjudication of lawsuits that assert rights created independent of collective bargaining agreements, but related to them in some way." *Michigan Mut. Ins. Co. v. United Steelworkers,* 774 F.2d 104, 106 (6th Cir. 1985). A claim is "independent" of a collective bargaining agreement when its resolution "does not require construing the collective bargaining agreement." *Lingle v. Norge Div. of Magic Chef,* 486 U.S. 399, 407, 108 S. Ct. 1877 (1988). Thus, the Supreme Court has held that a state court may properly review matters that relate to but do not require interpreting a collective bargaining agreement because such review does not conflict with the "policy of fostering uniform, certain adjudication of disputes over the meaning of collective bargaining agreements. *Id.* at 410-11, 108 S. Ct. 1877.

Thus, it is entirely irrelevant that respondent's underlying claim in the arbitration is federal in nature or that respondent cites § 301 of LMRA in its notice of removal. There can be no dispute that the claim between TWDC and respondent does not require any court (whether state or federal) to construe the collective bargaining agreement between respondent and ABC Inc. The only issues implicated by TWDC's claim in this action are choice of law questions related to privilege and whether or not TWDC has sustained its burden of demonstrating that the Memorandum is a privileged attorney client communication immune from disclosure under federal or state law.

Accordingly, under *Lingle*, while TWDC's claim that the Subpoena should be quashed because the Memorandum is privileged is related to the arbitration and the agreement pursuant to which the arbitration is being conducted, TWDC's claim is entirely "independent" of the collective bargaining agreement between ABC Inc. and respondent as a matter of law. *See, e.g., Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 407, 108 S. Ct. 1877 (1988).[4]

As previously stated herein, there is not a single federal court that has found subject matter jurisdiction to enforce an arbitral subpoena to a non-party to a collective bargaining in the face of that non-party's attorney client privilege objection. TWDC's motion to remand accordingly should be granted, and the question of whether TWDC's document is privileged determined by the state court in which this action was originally commenced.

POINT II

TWDC'S MOTION TO QUASH SHOULD BE GRANTED AND RESPONDENT'S CROSS-MOTION SHOULD BE DENIED

If this Court determines that it has subject matter jurisdiction to decide this dispute – and it should not – respondent's cross-motion to compel nevertheless should be denied and TWDC's motion to quash and/or for a protective order should be granted in its entirety.

A. ABC Inc. Cannot Be Compelled To Comply With The Subpoena Since It Is Not A Party To This Action

It is black letter law that a court does not have the power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction. *See, e.g., Doctors Associates, Inc. v. Reinert & Duree, P.C.*, 191 F.3d 292 (2d Cir. 1999), citing 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2956 at 335 (2d ed. 1995)("A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction"). Moreover, a person does not become a party merely by tacking their name to an existing caption. A person becomes a party when they either commence a lawsuit or are named as a party in a pleading and are properly served with process. *Id.*

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[4] Unlike the case at bar, the challenge to the subpoena in *Troha* did not involve the attorney client privilege. In any event, because this arbitral subpoena against a non-signatory does not implicate either a violation or the construction of a collective bargaining agreement, the Seventh Circuit's decision in *Teamsters National Automotive Transporters Industry Negotiating Committee v. Troha*, 328 F.3d 325 (7th Cir. 2003) is inapposite.

ABC Inc. has neither commenced a lawsuit nor been named as a party in the "action" respondent improperly seeks to remove. The operative and only pleading before this Court is TWDC's Verified Petition, dated July 28, 2010. *See, e.g.,* 28 U.S.C. §1441 and § 1446. However, TWDC did not name ABC Inc. as a party in the special proceeding it commenced in the state court. Accordingly, upon removal of that state court proceeding, only TWDC and respondent are the parties properly before this Court. Nor has ABC Inc. been served with process in this action. *See, e.g.* Mooney Dec. ¶ 10, and Fed R. Civ. Proc. 4(e).[5] In any event, since TWDC is the real party in interest pursuant to Fed. R. Civ. Proc. 17, and complete relief can be afforded between TWDC and respondent with respect to the privileged document at issue, there is no basis for joining ABC Inc. to this action. Accordingly, respondent's purported cross-motion against non-party ABC Inc. must be denied.

B. The Subpoena Seeks A Document That Is Protected From Disclosure By The Attorney Client Privilege And Must Be Quashed

At the heart of respondent's argument that TWDC should be required to submit its privilege claim to the procedures of an arbitration to which is it not a party is the contention that the arbitrator issued the subpoena to verify the accuracy of an exhibit ABC Inc. introduced during the arbitration (Employer Exhibit 8). *See, e.g.* Resp. Mem at 1. 6-7, 22-23. Indeed, in his affidavit, Mr. Mintz affirms that "[t]he Union believes that Employer's Exhibit 8 is part of a single document which contains the original and complete investigatory findings by Yang, her analysis, recommendations or conclusions, as well as the recommendations of various management

[5] Respondent's service of ABC Inc.'s in-house counsel with a copy of the Notice of Removal of the special proceeding involving only TWDC does not constitute service of "process" under either state or federal law sufficient to bring ABC Inc. within this Court's jurisdiction.

personnel." Affidavit of David Mintz, sworn to on August 9, 2010 (the "Mintz Aff.") ¶ 13. The record contradicts these assertions.

As respondent knows full well, Employer's Exhibit 8 – a computer forensic report related to Mr. Pinkava – was extracted from a larger computer forensic report created by Tim Gruber (the "Gruber Report"). Significantly, respondent introduced the Gruber Report into evidence during its July 23, 2010 cross-examination of Ms. Yang as Union Exhibit 3. Mr. Mintz repeatedly confirmed with Ms. Yang that Employer Exhibit 8 was extracted and compiled solely from Union Exhibit 3 and not from the Memorandum at issue. Indeed, during his cross-examination, Mr. Mintz chided Ms. Yang for referring to Employer Exhibit 8 as "extracted" from Union Exhibit 3 because the two reports were virtually identical with respect to Mr. Pinkava. *See,* Reply Affidavit of Grace Yang, sworn to August 13, 2010 ("Yang Reply Aff.") ¶ 3. The record is also clear that the Memorandum was an entirely separate document from either Employer Exhibit 8 or Union Exhibit 3 and that she prepared the Memorandum for the purpose of seeking legal advice from Mr. Yellin. *Id;* Exhibit C to the Schwartz Dec.

1. Attorney Client Privilege Is A Substantive Issue To Be Determined By The Court

Respondent argues that since "procedural" questions that arise in the context of an arbitration should be decided by the arbitrator, the question of non-party TWDC's privilege should also be decided the arbitrator. Respondent is wrong, and the generic cases upon which respondent relies are inapposite.[6]

First, although evidentiary in nature, whether a communication is protected from disclosure by the attorney client privilege is a substantive not procedural issue. *See, e.g., Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967); *Brandman v. Cross & Brown*

[6] Respondent cites the Second Circuit's decision in *Klein v. Waltson & Co.*, 432 F.2d 936 (2d Cir. 1970) for the proposition that "procedural disputes that arise during the course of an arbitration are best left to the arbitrator." Resp. Mem. at 13. *Klein* says no such thing. The matter before the Court in *Klein* involved the propriety of the district court's order staying the federal court action pending the final determination of the state court action. There is no mention of an arbitration anywhere in *Klein.*

Company of Florida, 125 Misc. 2d 185, 479 N.Y.S.2D 435 (S.Ct. Kings Co. 1984)(issue of privilege is substantive, not procedural). Moreover, not one of the cases respondent cites holds that substantive determinations concerning the attorney client privilege are the province of the arbitrator, much less the exclusive province. Resp. Mem. at 13. Second, respondent's cases on this point all involve parties who have consented to the arbitration and its procedures, and not a non-party such as TWDC. Not only has TWDC not consented to be bound by the arbitration, but expressly objects to submitting its attorney-client privilege claim to the fact-finding arbitrator for determination.

TWDC respectfully submits that this Court should adopt the rationale behind the court's decisions in both *Minerals and Chemicals Philipp Corp., et al. v. Minerals and Chemicals Philipp Corp.,* 15 A.D.2d 432, 224 N.Y.S.2d 763 (1st Dept. 1962) and *Reuters Limited v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 662 N.Y.S.2d 450 (1st Dept. 1997)(non-party to arbitration proceeding entitled to judicial determination of whether documents called for by non-judicial arbitration subpoena are highly confidential and not subject to disclosure). These decisions stand for the proposition that non-parties who have not consented to the procedures of a private arbitration are entitled to a judicial determinations on challenges to a subpoena involving attorney client privilege or highly confidential matters. *Cf. Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 2d 69 (S.D.N.Y. 1995), abrogated on other grounds, (court has a duty to determine the propriety of an arbitral subpoena to a nonparty, particularly as it relates to substantive objections).

Compelling TWDC to comply with the Subpoena and submit its privileged document to the arbitrator for determination additionally violates TWDC's due process rights since the arbitrator has already stated that TWDC, as a non-party, does not have standing in the arbitration to interpose its defenses to the Subpoena. *See* Exhibit B to the Schwartz Dec. Respondent cites no precedent for the proposition that a privilege holder may be deprived of its right to defend against a subpoena that seeks its priviledged attorney client communication by turning over that defense to a party to the arbitration. TWDC may not be compelled to have ABC

Inc. defend TWDC's claim of privilege in the arbitration, which is precisely the result respondent seeks. Respondent is not prejudiced in the least by having a court determine TWDC's privilege claim.

2. California Has Greater Interest In TWDC's Privilege and Bars In Camera Inspections

Federal Rule of Evidence § 501 expressly provides that regardless of whether federal common law applies, a privilege claim shall be determined in accordance with state law, where, as here, state law supplies the rule of decision to an element of a claim or defense. Contrary to respondent's argument, California state law should apply to the claims and defenses TWDC raises in its state court Petition and motion to quash.

Respondent concedes that "[u]nder New York's choice of law, the governing law is that of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Lego v. Stratos Lightwave, Inc.*, 224 F.R.D 576, 578 (S.D.N.Y. 2004)(federal court ruling on state court claims, applying New York state law). Respondent also concedes that where the choice of law involves the attorney client privilege, New York courts apply "the law of the jurisdiction in which the asserted privilege communications were made, which in most of the cases was also the jurisdiction in which the party who made the communication resided." Respondent nevertheless conclusorily asserts that New York has the greater interest in this issue. Respondent is wrong.

As TWDC demonstrated in its moving papers, New York's interest analysis requires application of California's privilege law to determine whether the Memorandum is an attorney-client communication protected from disclosure. *See,* TWDC Moving Mem. at 8-12 . Clearly, California has the greater interest since the document was prepared and transmitted in California, the legal advice was sought and rendered in California, to a corporation with its principal place of business in California. There can be no doubt that the Memorandum was created with the expectation that it would be treated as privileged under California law. The prevailing law cited in TWDC's Moving Mem. at 8-12 mandates that California's privilege law applies to TWDC's claim that the Memorandum is a privileged attorney client communication, and, accordingly is not subject to an *in camera* inspection under Cal.Evid. Code § 915. *See* TWDC Moving Mem. at 12.

3. The Memorandum Is A Privileged Attorney Client Communication

Regardless of what law applies, there is abundant evidence in the record that the Memorandum is a privileged attorney client communication between Ms. Yang and Mr. Yellin immune from disclosure under *Upjohn Company v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981). Respondent's contrary contention ignores both Ms. Yang's express hearing testimony that she prepared the Memorandum for the purpose of seeking Mr. Yellin's legal advice and the sworn statements Mr. Yellin and Ms. Yang each submitted in support of TWDC's motion setting forth in great detail the privileged nature of the communication.

Respondent misunderstands the basis of TWDC's privilege claim and the governing law when it asserts that notwithstanding these sworn statements, the Memorandum is nevertheless discoverable because the investigation allegedly was for business not legal purposes. The business or legal nature of the investigation is entirely irrelevant. TWDC is not asserting a privilege over the underlying facts of the investigation that was conducted of, among others, Mr. Pinkava. Ms. Yang testified fully as to those facts at the hearing on both direct and cross-examination. In addition, respondent has had access to the facts of the investigation all along. Respondent either attended or was invited to attend all but one of the employee interviews, and for that one was provided forensic evidence and reports and as well interview notes. Yang Reply Aff. ¶ 4; Mooney Dec. ¶ 6. Respondent has been provided with copies of the non-privileged forensic reports for the other employees implicated in the investigation as well as any interview notes Ms. Yang took of the interviews she attended. Yang Reply Aff. ¶ 4 and Mooney Dec. ¶ 6. Respondent's contention that the Memorandum was compiled from reports it has not seen is false. All of the non-privileged reports involving the investigation have been produced to respondent. Mooney Dec. ¶ 6. The Memorandum is the only "report" that has been withheld on privilege or any other grounds. *Id.*

As the Supreme Court expressly held in *Upjohn*, TWDC is entitled to absolute protection under the attorney client privilege of its "communication" of those underlying facts to its in house legal counsel for the purpose of seeking legal advice without regard to whether the investigation itself was for legal or business purposes. *H.W. Carter & Sons, Inc. v. William Carter Co.*, 1995 WL 301351 (S.D.N.Y. 1995). Indeed, respondent has no more legal right to obtain this privileged written communication between Ms. Yang and Mr. Yellin then it would have to be present in the room while Ms. Yang communicated these very same facts to Mr. Yellin over the telephone based on the underlying raw data that respondent already possesses. Respondent cannot invade this protected sanctum of attorney client privileged communications because it was easier for Ms. Yang to provide the facts to Mr. Yellin in writing rather than orally from her memory, the reports and interview notes. *Upjohn Company v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981); *In Re Woolworth Corporation Securities Class Action Litigation*, 1996 WL 306576, at *1 (S.D.N.Y. June 7, 1996)(memoranda created in the process of corporate investigation with counsel constitutes privileged attorney-client communication not subject to disclosure, even though underlying facts of the investigation on which the communication was based had been disclosed).

TWDC has more than satisfied its burden on this motion that the Memorandum is a privileged attorney client communication, and the matter can and should be determined by the Court, not in an arbitration proceeding to which TWDC did not consent. Accordingly, this Court should quash the Subpoena and/or issue a protective order preventing its disclosure, and deny respondent's cross-motion to compel in its entirety.[7]

4. Respondent Has Failed To Establish That TWDC's Privilege Was Waived

Although respondent concedes that only the privilege holder – here TWDC – can waive the attorney client privilege, it nevertheless argues that ABC Inc. waived TWDC's privilege

[7] TWDC respectfully submits that the record here, without more, establishes that the Memorandum is a privileged attorney client communication, and that, as noted above, under applicable California law, an *in camera* inspection is prohibited. If the Court determines that an *in camera* inspection is warranted to confirm TWDC's privilege claim, as TWDC established in its moving papers and, above, any such inspection must be conducted by the Court or by a court appointed referee so as to avoid exposing the ultimate fact finder to privileged information. As set forth above, under no circumstances should non-party TWDC, over its objection, be required to submit its privileged document to a privately selected arbitrator for an *in camera* inspection in an arbitration to which it is not a party, particularly, where, as here, the arbitrator has already rejected TWDC's standing to interpose its privilege defenses to the Subpoena.

during the hearing. As set forth above, the factual premise of respondent's argument is flatly contradicted by the record. There is no basis for either of respondent's waiver arguments and they should be rejected by this court.

The record confirms that neither TWDC nor ABC Inc. have attempted to use the privilege as either a sword or a shield as respondent erroneously claims. Nor has there been any selective disclosure of the privileged communication TWDC seeks to protect. As noted, Employer Exhibit 8 was not compiled from the privileged Memorandum, as respondent claims (Resp. Mem. at 23). Employer Exhibit 8 was compiled entirely from Union Exhibit 3, which was produced to respondent in its entirety and which respondent introduced into evidence at the hearing. Yang Reply Aff. ¶ 3; Mooney Dec. Regardless of how respondent characterizes it, the Memorandum is an entirely separate document that Ms. Yang prepared solely for the purpose of obtaining Mr. Yellin's legal advice. Yang Reply Aff. ¶ 5; Exhibit C to the Schwartz Dec.

Nor did not Ms. Yang testify about the Memorandum in a manner that would waive of TWDC's privilege. To the contrary, Ms. Yang simply identified the Memorandum's existence in response to respondent's inquiry as to whether a document existed that contained recommendations, conclusions and analyses. *See* Exhibit 1 to the Mooney Dec. at 148-149; July 13 Tr. at 190-191, Exhibit C to the Schwartz Dec. Ms. Yang immediately made clear that the document had been prepared for the purpose of seeking counsel's advice. *Id*. That was sum total of Ms. Yang's testimony "about" the Memorandum. When respondent's counsel nevertheless called for its production, ABC Inc.'s counsel Mary Mooney properly objected to its disclosure on the grounds of the attorney client privilege. Mooney Dec. ¶ 4 and Exhibit 1 thereto. There is no legal or factual basis for respondent's contention that TWDC's privilege was waived when ABC Inc. introduced Employer Exhibit 8 into evidence.

Respondent's second waiver argument is predicated on Federal Rule of Evidence (612)(2). That rule, however, expressly requires a showing that the witness used the writing to "refresh memory for the purpose of testifying." There is no record evidence that Ms. Yang used the Memorandum to refresh her recollection for her July 13, 2010 testimony or otherwise in connection with her testimony.[8] To the contrary, the only evidence in the record is that Ms. Yang reviewed the Memorandum in connection with her communications with Mr. Yellin to obtain his legal advice. Yang Reply Aff. ¶ 5. Ms. Yang's review of her own privileged document for purposes other than her testimony is insufficient as a matter of law to effect an affirmative waiver of TWDC's attorney client privilege. *See, e.g., Suss v. MSX Int'l Eng'g Servs., Inc.*, 212 F.R.D. 159,163 (S.D.N.Y. 2002)(witness' review of privileged document that she prepared herself does ***not*** constitute a waiver of the attorney-client privilege, even where witness admitted the review refreshed her recollection).

In *Suss v. MSX Int' l Eng'g Servs., Inc.*, the court squarely rejected the plaintiff's argument that the attorney-client privilege was automatically waived merely because certain privileged documents had been used to refresh the witness' recollection prior to her deposition. Rather, *Suss* determined that "the relevant inquiry is *not* simply whether the documents were used to refresh the witness's recollection, but rather whether the *documents were used in a manner* which waived the attorney-client privilege." *Id.* at 163-164 (emphasis added). Accordingly, *Suss* concluded that the privilege "would *not* be lost if an individual were to review his *own already privileged documents*." *Id.* at 164 (citing Wright & Gold, Federal Practice and Procedure: Evidence § 6188 at 485) (emphasis added).

The facts here are even more compelling than in *Suss* for rejecting respondent's waiver argument. In *Suss,* the record supported the conclusion that the witness's review of her own privileged document refreshed her recollection. Here, Ms. Yang reviewed her own privileged document for the very purpose that it was created, to obtain legal advice – not to refresh her recollection. Respondent, however, fails to point to any record evidence to support its contention that Ms. Yang's recollection was refreshed during that review. Absent this critical element, respondent's second ground for argument TWDC's privilege has been waived must be rejected.

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[8] As the transcript of Ms. Yang's cross-examination confirm, respondent failed to make a record that Ms. Yang reviewed the Memorandum to refresh her recollection. *See* July 13, Tr. at 195, Exhibit C to Schwartz Dec.

In sum, TWDC is entitled to a judicial, not arbitral, determination of its privilege claim with respect to the Memorandum. As TWDC has established, the document at issue is protected from the disclosure and there has been no waiver of that protection.

CONCLUSION

For the foregoing reasons as well as those set forth in the accompanying Reply Affidavit of Grace Yang and the Declarations of Mary Mooney and Rachel Schwartz, as well as in TWDC's moving papers, TWDC respectfully requests that its motion to remand this proceeding be granted in its entirety, or, alternatively, that the Subpoena be quashed and a protective order issued preventing the disclosure of the Memorandum to respondent or the arbitrator, and that respondent's cross-motion be denied in its entirety.

Dated: New York, New York
August 17, 2010

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